Filed 2/6/03 Steiner v. Feldman CA2/5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LEONARD STEINER et al.,	B155738
Plaintiffs and Appellants,	(Super. Ct. No. SC059371)
v.	
PHILLIP FELDMAN,	
Defendant and Respondent.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Cesar C. Sarmiento, Judge. Affirmed.

Steiner & Libo and Leonard Steiner for Plaintiffs and Appellants.

Waxler Carner Weinreb Brodsky and Barry Z. Brodsky, Gretchen S. Carner, and Robin M. McConnell for Defendant and Respondent.

Introduction

This malicious prosecution action is based on an unsuccessful attorney malpractice action, which was in turn based on a securities arbitration. It went like this:

First, Leonard Steiner, appellant here, represented Estheranne Billings in a National Association of Securities Dealers arbitration. Billings obtained an award of

$320,000. Next, Billings sued appellant for malpractice. Respondent Philip Feldman assisted her in so doing. (The exact nature of the Billings-Feldman relationship is an issue here, albeit one which we do not reach.) Appellant prevailed after his motion for summary judgment was granted. He also prevailed on his cross-complaint in that action, for fees, obtaining an award of over $93,000.[1]

Finally, in the case which is now before us, appellant sued Feldman (and Billings, and others who are not parties here) for malicious prosecution. Judgment was entered in Feldman's favor after his motion for summary judgment was granted. We affirm.

Facts

Billings's malpractice complaint against appellant was filed on July 23, 1996, and a first amended complaint was filed later. (Our record does not include a copy of either pleading.) The complaints were apparently filed in pro per, although the complaint in this case includes allegations that Billings was assisted by an attorney named Laurie Butler, a defendant in this action but not a party to this appeal. Appellant's demurrers to those complaints were sustained with leave to amend. It was at that point that Feldman came into the picture.

In support of his summary judgment motion in this case, Feldman declared that he was first contacted by Billings in July, 1997. She was seeking representation in her lawsuit against appellant. Feldman refused to represent her but agreed to act as a "consulting expert." He also referred her to another defendant in this action who is not a party to this appeal, a lawyer named Boyd Lemon, who specialized in legal malpractice cases. Feldman declared that "Due to the fact that time was running out for Ms. Billings to file an amended pleading after demurrer, in my capacity as consulting expert, I assisted her in drafting a second amended complaint. I provided her with a draft second amended complaint, a verification form for her signature, and a blank proof of service." Billings

[1] Appellant's request that we take judicial notice of various pleadings and orders in that action is granted.

supplied all the facts alleged in the second amended complaint. Feldman assumed that the facts were true, an assumption supported by her willingness to verify the complaint.

Feldman declared that he did not act with malice or any improper motive when he acted as Billings's consulting expert. Based on her representations, he believed that she had viable fraud and malpractice claims against appellant.

Billings's second amended complaint against appellant was attached to the motion. It is based on a form complaint, and brings causes of action for fraud and negligence. It is signed by Billings. The verification and proof of service is dated July 17.

In the negligence cause of action, the complaint alleged that appellant's "shortfalls" included, inter alia, failure to refer Billings's case to specialists, failure to inform her of alternatives to arbitration, failure to join and serve parties, failure to prove a prima facie case against certain defendants, failure to timely obtain proof of damages, and failure to properly prepare Billings for trial. In the fraud cause of action, the complaint alleged that appellant had represented that punitive damages were available based on the egregiousness of the brokers' acts, which included forgery, that treble damages could be awarded under Civil Code section 3345, and that his firm specialized in securities fraud. In fact, appellant failed to prove punitive damages, failed to determine whether Civil Code section 3345 applied to NASD arbitrations, and his firm did not have or apply the necessary specialized skills. Finally, the complaint alleged that but for appellant's torts, Billings would have collected a far greater judgment.

Feldman's summary judgment motion also proposed undisputed facts based on Lemon's answers to the interrogatories propounded by appellant in this action:[2] Lemon

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[2] Feldman submitted both the answers themselves and the declaration of his counsel reciting the facts found in the answers. Appellant contends that the answers and the declaration were hearsay, and also contends that he made those objections below, in his late-filed separate statement of facts. We do not consider the objections. Appellant's late-filed response includes only relevance objections. At best, these are objections raised for the first time on appeal. (*Malmstrom* v. *Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 320; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 783.)

was contacted by Billings on July 20, 1997. He also spoke with Feldman on that date. When Lemon read Billings's second amended complaint against appellant he reached the opinion that it stated a cause of action. From a lengthy document Billings submitted in opposition to an earlier demurrer and some other documents, Lemon concluded that there was more than probable cause to allege causes of action for malpractice and fraud against appellant. He believed that the legal malpractice cause of action was supported by Billings's statement that appellant failed to pursue and introduce evidence of fraud or to present a summary of her damages, and failed to join certain defendants. He believed that the fraud cause of action was supported by Billings's statement that appellant told her that he would try the case on the basis of fraud, but failed to do so without a rational explanation.

Appellant's opposition to Feldman's motion was due on October 4. On that date, appellant moved ex parte for an order extending time to reply to October 9. The trial court denied the motion and later refused to consider appellant's late-filed response.

That response included appellant's declaration to the effect that Billings was a "deeply disturbed" woman who could not accurately present facts, frequently came to his office in her nightgown and slippers, wrote him hundreds of pages of incomprehensible letters, and was institutionalized in early 1995 for her mental illness. Even a fleeting conversation would reveal her to be severely mentally ill. Appellant's declaration also addressed some of the allegations of the second amended complaint. He declared that he did present evidence of fraud at the arbitration and that he joined all parties over whom the NASD had jurisdiction. He had never promised Billings that she would recover punitive damages or treble damages. He did say that he would seek those damages, and he did so.

Discussion

In order to establish a cause of action for malicious prosecution, a plaintiff must demonstrate that the prior action was commenced by or at the direction of the defendant and was pursued to a legal termination in the plaintiff's favor, was brought without

probable cause, and was initiated with malice. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50; Rest.2d Torts, §§ 653-681B.) We find that the trial court correctly concluded that, based on the facts at summary judgment, appellant could not establish that the malpractice action was brought without probable cause. Feldman thus carried his burden of showing that appellant could not establish the cause of action.[3] (Code Civ. Proc., § 437c subd. (o); *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573.)

The standard of probable cause is whether any reasonable attorney would have thought the claim tenable. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 886.) In determining probable cause, the trial court must make an objective determination of the reasonableness of the defendant's conduct. That is, the trial court must determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. (*Ibid*.)

Another court has explained the standard: "Reasonable lawyers can differ, some seeing as meritless suits which others believe have merit, and some seeing as totally and completely without merit suits which others see as only marginally meritless. Suits which all reasonable lawyers agree totally lack merit -- that is, those which lack probable cause -- are the least meritorious of all meritless suits. Only this subgroup of meritless suits present no probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 382.)

Here, the evidence that Lemon, a lawyer specializing in legal malpractice cases, believed that the complaint stated a cause of action, establishes that the case did not completely lack merit. The fact that the complaint survived demurrer in itself establishes that the action was legally tenable. (*Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 624, see also *Roberts v. Sentry Life Insurance, supra,* 76 Cal.App.4th at

[3] We need not, and do not, reach the trial court ruling on the remaining elements of the cause of action.

p. 383 [denial of defendant's summary judgment motion is persuasive evidence that a suit does not totally lack merit].)

Appellant argues that probable cause was not established because Feldman never specified the information he received from Billings. We read the record differently. Feldman specified that Billings provided him with the facts which he included in the second amended complaint, that is, that appellant did not bring the proper parties into the litigation, failed to introduce necessary evidence, falsely promised that he would seek punitive damages, falsely represented that treble damages were available, and falsely represented that his firm had the skills necessary to litigate the case.

Despite the trial court ruling on demurrer, appellant argues that the allegations in the fraud cause of action were insufficient, in that the complaint merely alleged that he made statements of opinion or predictions of future events, which are not representations which can support a cause of action for fraud. (5 Witkin, Summary of Cal. Law (9th ed. 1990) Torts, § 678.)

We do not see that the complaint failed in that way. Billings alleged that appellant represented that he had the ability to present her case and that he would do so in a specified manner. Those are not opinions or predictions, but statements of fact. Further, even representations of opinion can form the basis of fraud if the person expressing the opinion purports to have expert knowledge concerning the matter or occupies a position of confidence and trust. (*Seeger v. Odell* (1941) 18 Cal.2d 409, 414.) That was the allegation here.

It is true that, as appellant argues, Feldman relied on Billings's statements and did not conduct an independent investigation, but that fact does not change the result here. An attorney is entitled to rely on information provided by the client. "'Usually, the client imparts information upon which the attorney relies in determining whether probable cause exists for initiating a proceeding. The rule is that the attorney may rely on those statements as a basis for exercising judgment and providing advice, unless the client's representations are known to be false.' (Mallen & Smith, Legal Malpractice (5th ed. 2000) § 6.19, p. 620.)" (*Morrison v. Rudolph* (2002) 103 Cal.App.4th 506, 512-513.)

Arcaro v. Silva & Silva Enterprises Corp. (1999) 77 Cal.App.4th 152, cited by appellant, does not assist him. In that case, the plaintiff in the underlying action proceeded despite the fact that he *knew* that a fundamental element of the case was disputed. (*Id.* at p. 158.) The unusual facts of *Arcaro* created an exception to the rule that the adequacy of a pre-filing investigation is irrelevant to the issue of probable cause. (*Swat-Fame, Inc. v. Goldstein, supra,* 101 Cal.App.4th at p. 627.) There are no similar circumstances here.

Appellant also argues that the trial court erred in refusing his request for a continuance to file his reply papers and in refusing to consider his late-filed response. We need not consider the claim of error, because the ruling could not have changed the result. Any error would have been harmless.

Appellant's proposed facts on the issue of probable cause were, in general, in support of his contention that due to Billings's obvious mental illness, Feldman was not free to accept her version of the facts, but had a duty to investigate. The facts do not support the argument, because they lacked either foundation or relevance. Appellant made no showing that he had the expertise necessary to opine on Billings's mental state. The factual contentions which were made on his personal knowledge, for instance that Billings wrote him incompressible letters or appeared in his office in her nightgown, simply do not indicate that she did anything bizarre or abnormal when she met with Feldman.

Finally, appellant argues that the court erred in refusing to allow oral argument. As we read the record, appellant was allowed to argue and did so, arguing that Feldman had not met his burden on summary judgment because he had not provided the court with information about Billings's statements or with information about Billings's reliability. The only argument the trial court refused to hear was argument based on matters found only in appellant's late filed documents. As we have seen, nothing in those documents could have assisted appellant.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P.J.

GRIGNON, J.